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NTSB Order No. EA-3982

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of September, 1993

JOHN H. GILFOIL, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 85-EAJA-SE-8536

OPINION AND ORDER

The applicant appeals from the initial decision of Administrative Law Judge Joyce Capps issued on August 16, 1990, denying his application for an award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA) (5 U.S.C. 504) and our implementing rules.[1] See 49 C.F.R. Part 826. The

[1]A copy of the initial decision denying the application is attached.

law judge found first that the applicant was not a prevailing party entitled to an EAJA award, and second that there could be no recovery in any event because there was "complete justification on the part of the Administrator to bring this action against the applicant and to pursue the action until final adjudication." (Initial Decision, at 2-3.) Because we disagree on both points, we will make an award of attorney's fees in this proceeding.

In the underlying proceeding, the Administrator had revoked, on an emergency basis, the applicant's Airline Transport Pilot certificate (ATP) on charges that he had violated Federal Aviation Regulations (FAR) 121.315(c) and 91.9, regulations governing cockpit check procedures and the avoidance of careless flight, respectively. A brief review of the facts on which those charges were based is necessary to understand our judgment on the respondent's appeal from the denial of his EAJA application.

Shortly after takeoff on a flight from Los Angeles, California to Cincinnati, Ohio, the applicant, who was not operating the controls at the time, noticed a cockpit warning light indicating a possible failure of the Electronic Engine Control for one engine. Without first advising the first officer, he attempted to cycle the EEC switches, but, in doing so, he inadvertently shut off the immediately adjacent fuel control (EEC) switches for both engines. The engines were restarted following a descent to within 500 feet of the surface. The climb was resumed and the flight proceeded to its

destination. The day after the incident, the Administrator issued a General Notice stating that such a mistake had occurred before and asserting a belief that the close proximity of the switches was a design problem. The Administrator also issued an emergency Airworthiness Directive requiring that the fuel control switches be protected by a guard, and a Notice of Proposed Rulemaking, issued October 30, 1987, which determined that the dual engine shutdowns in this and one other incident were to some extent attributable to the design of the flight deck on Boeing 767 and 757 aircraft. The Administrator proposed, among other things, that the EEC switches be relocated from the control stand to the overhead panels. See 52 FR 43770 (November 16, 1987).

On the applicant's appeal from the revocation order, the administrative law judge found that there were, as alleged, violations of the FARs -- specifically, failure to follow approved cockpit check procedures by not notifying the co-pilot of the situation, and operating in a careless or reckless manner so as to endanger the life or property of another. However, she did not conclude that the incident showed that the airman, a professional pilot for over 30 years, had been shown to lack qualification to hold an ATP certificate. Instead, she found that the incident warranted a 90-day suspension. An appeal by the Administrator from the reduction in sanction was rejected by the Board. NTSB Order No. EA-2937 (May 19, 1989).

Applicant's appeal of the administrative law judge's subsequent denial of a request for attorney's fees focuses on

what applicant believes to be two errors in the judge's brief analysis. The first specification of error is that, contrary to the law judge's holding, applicant was a prevailing party in the sense necessary to qualify for fees under EAJA. As the Administrator does not offer argument against this proposition, we will not pause at length over the issue. Applicant argues that he had at all times (including prior to trial and again prior to appeal to the full Board) indicated to the Administrator that he did not contest the facts underlying the certificate action -- but that some reasonable suspension rather than revocation was the proper penalty. The Administrator at each step chose to continue to seek revocation. Given the outcome, we think it is clear that applicant achieved a benefit sufficient to be deemed prevailing.[2] This is not a case of simple sanction reduction, but a proceeding in which the argument was between revocation and suspension and the government was aware of the fact that the lesser of the penalties (at least in principle) would not have been contested by applicant. Consequently, the litigation is fairly understood as litigation over sanction, and in this contest applicant clearly prevailed.

Applicant also believes that the government was not substantially justified in continuing to press for revocation when the offer of acceptance of a suspension had been made. To

[2] See, e.g., National Coalition Against Misuse of Pesticides v. EPA, 828 F. 3d 42,44 (D.C. Cir 1987) (although EAJA does not define "prevailing party," the term requires that the final result represent in a real sense a disposition that furthers [petitioner's] interest).

establish "substantial justification" the burden is on the government to ". . . show: (1) that there is a reasonable basis in truth for the facts alleged in the pleadings; (2) that there exists a reasonable basis in law for the theory it propounds; and (3) that the facts alleged will reasonably support the legal theory advanced." McCrary v. Administrator, 5 NTSB 1235, 1238 (1986). The relevant inquiry is whether the Administrator's case is "...`justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). In Martin v. Lauer,[3] the D.C. Circuit noted that examination of each level of proceedings "will induce the government to `evaluate carefully each of the various claims' it might make on appeal and 'assert only those that are substantially justified.'" Id. at 44 (quoting Spencer v. NLRB, 712 F.2d 539, 557 (1983)).

In support of his position that he was substantially justified in seeking revocation,[4] the Administrator argues that the incident showed lack of judgment on the part of the applicant which, combined with the seriousness of the incident, justified the enforcement action. It is hard, however, not to read the Administrator's arguments without concluding that there is too much concentration on the issue of whether any certificate action was justified, which is not the pertinent inquiry. What needs to

[3]740 F.2d 36 (D.C. Cir. 1984).

[4]Revocation, unlike suspension, is not warranted absent a showing that the certificate holder lacks qualification.

be determined is whether litigation for the purpose of revocation was justified. And while it is not disputed that this was a serious mishap, revocation is supposed to reflect an assessment of the gravity of the certificate holder's conduct and accountability, in the context of his continued possession of the necessary qualities for the certificate held. "The proper standard for revocation, ... is not whether specific violations demonstrate a failure to exercise the necessary qualifications of a certificate holder, but rather whether they demonstrate that the holder no longer possesses such qualifications." Administrator v. Wood, 3 NTSB 3974, 3976-77 (1981).

Thus, in determining whether revocation is the proper sanction, a distinction is drawn between a showing of a lack of qualification and the proof of a single instance of careless error on the part of an otherwise well-qualified pilot.[5] The question here then is whether the Administrator was substantially justified in believing at each step of the proceeding that he was or continued to be justifed in seeking revocation as sanction.

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[5]In the law judge's oral initial decision, she said:

> The government has asked for a revocation of this man's ATP privileges that he has held for over 30 years because on June 10, 1987 he activated the fuel control switch when he meant to activate the EEC.
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> The full Board is going to have to do that if that is going to occur, because I'm not going to do it for that mistake on that occasion, and under all of these circumstances. Transcript, at 329.

On appeal, the full Board refused to revoke the applicant's certificate.

The Administrator's rationale for the pursuit of revocation gives little weight to several relevant factors: namely, the inadvertent nature of the applicant's mistake, the design problem that to some degree contributed to it, and the applicant's extensive experience in and qualification for the aircraft in question. Furthermore, while the Administrator quibbles with some aspects of applicant's subsequent check ride, it is established that applicant was given a check ride observed by the FAA as a result of this incident and that the FAA inspector concluded that applicant was qualified to hold his ATP certificate. Given these circumstances, and applicant's stated willingness to acquiesce in some period of suspension, we cannot find the Administrator's pursuit of revocation to have been substantially justified.

While a reduction in sanction may not typically support a conclusion that the respondent was the prevailing party, in this case the facts and circumstances warrant such a result. Since it was clear to the Administrator from the outset that he would have accepted a suspension in connection with the alleged violations, respondent's costs in defending against a revocation of his certificate at the hearing and on appeal to the full Board are directly attributable to the Administrator's insistence on seeking sanction at a level that the Administrator should have known not to be substantially justified under past practice or precedent. The applicant is, therefore, entitled to recover those expenses under EAJA.

On appeal to the Board, the Adminstrator has not contested any of the expenses sought, but has reserved the right to reply to any additional claim of expense that may be made by applicant for fees related to the EAJA litigation. In addition, for the Board to rule on this application in accordance with the recent modification to its EAJA rules (Equal Access to Justice Act Fees, 58 FR 21543 (April 22, 1993)), applicant would need to supplement the existing record with information on counsel's customary fee for similar services, the prevailing rate for similar services in the community in which the attorney practiced, and a calculation of any additional amounts to which he believes he is entitled under the new cap. Therefore, before the Board issues a final decision in this proceeding, each side will be given the opportunity for further submission.

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's appeal is granted;

2. The law judge's initial decision is reversed; and

3. Applicant may supplement the record within 20 days of the date of this order; any reply is due 40 days from the date of this order.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.